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STUDY PROJECT

MAY 1982

COMMAND CRIMINAL RESPONSIBILITY:
A PLEA FOR A WORKABLE STANDARD

by

COLONEL WILLIAM G. ECKHARDT
JUDGE ADVOCATE GENERAL'S CORP

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to examining these standards, command criminal responsibility is defined, reasons for its examination are explored, and the timeliness of its debate is discussed. The objective of this essay is to examine its international and domestic aspects of command criminal responsibility in an effort to facilitate understanding and intelligent dialogue between commanders and lawyers.



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USAWC MILITARY STUDIES PROGRAM PAPER

COMMAND CRIMINAL RESPONSIBILITY:
A PLEA FOR A WORKABLE STANDARD

Individual Study Project

Colonel William G. Eckhardt
Judge Advocate General's Corps

US Army War College
Carlisle Barracks, Pennsylvania 17013
25 May 1982

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ABSTRACT

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Professional conduct on the battlefield is the heart of military professionalism. The need for appropriate articulation of expected battlefield conduct is the theme of this project. The unresolved issues and nonexistence or inarticulateness of the current standards are explored using as a medium the Medina case which arose from the tragic My Lai incident. Current standards are compared with standards found in the new proposed Protocols to the Geneva Conventions. Prior to examining these standards, command criminal responsibility is defined, reasons for its examination are explored, and the timeliness of its debate is discussed. The objective of this essay is to examine its international and domestic aspects of command criminal responsibility in an effort to facilitate understanding and intelligent dialogue between commanders and lawyers.

PREFACE

A major revision of the law of war is in process. The unusual timing of historical and political events requires Americans to seek a practical articulation of the standard of behavior expected of their combat commanders. The purpose of this essay is to constructively participate in that search.

The cornerstone of military professionalism is professional conduct on the battlefield. The articulation of that professional conduct, in addition to underscoring the legitimacy of the honorable profession of arms, would be a shield for commanders from untutored, politically motivated allegations of war crimes and, more importantly, would allow the teaching of expected conduct and thus prevent institution-staining misconduct. An examination of the current and the proposed new standards reveal an alarmingly unsettled and dangerously inarticulated expression of the most basic social contract between a soldier and the citizenry he serves.

This paper constitutes a plea for soldiers to articulate the essential ingredients of their profession and thus return to a central role in controlling its rules. Lawyers are admonished to "do their duty" and articulately complete the coupling between international and domestic standards. Productive dialogue between commanders and lawyers is stressed and the need for reordering our training regarding professional conduct on the battlefield is recognized. The humanitarian and the soldier must "get in step." The more professional our armed forces, the more likely that the goals of the humanitarian will be served.

CHAPTER I

INTRODUCTION

The War Crime Trials of World War II are becoming a part of the history books. Nearly ten years have past since the height of the divisive Vietnam conflict. In a process made more difficult by the ideological divisions of the modern world, over one-hundred nations under the auspices of the International Committee of the Red Cross participated in drafting proposed new Protocols to the 1949 Geneva Conventions.¹ A major revision of the law of war is in process. The unusual timing of historical and political events requires us to seek a practical articulation of the standard of behavior on the battlefield expected of American service personnel.

Such a standard is the most basic of social contracts. It is an attempt to reconcile military needs with the requirements of humanity. Its expression, to be effective, must reflect the collective conscience of mankind. It must include implementation of international obligations; its aim will be to force certain behavior. Practically, it is a welding point where the raw use of power is joined with the political objective. This standard of combat behavior will unfortunately be written in legal language since ultimately it must be enforced by criminal sanctions. Its expression is the ultimate test for military discipline. A standard that is expressed with certainty, with authority, with consensus, and with directness is the foundation for effective training. A properly

articulated and understood standard allows the teaching and preventive functions of the law to be appropriately exercised. Such a standard is the vehicle for discussion of the ethical and moral considerations of war. In short, an agreed upon standard is the cornerstone for the application of reasoned moral judgment and the rule of law on the battlefield.

Through the friction and fog of war, it is primarily the authority of the commander which gets things done. At such times states, soldiers and citizens trust their "all" to him. Never has so much been expected of a commander. Modern technology demands an almost instantaneous consideration of military necessity, humanity and chivalry. He must distinguish relevant from irrelevant targets, seeking only the destruction of legitimate objectives. He is expected to perform the Solomon-like task of proportioning the amount of military destruction with the military value of the objective. The voices of humanity remind a commander that war is a political weapon. Gratuitous unnecessary suffering or destruction is irrelevant to his military purpose and often counter-productive. Somehow he is to divine the least coercive method. Adding to the complexity, are the remnants of chivalry or professional courtesy which impose upon a representative of a proud military profession lineage and tradition which have their own imperatives.

Prior to World War II, legal standards for commanders were practical articulations of the accepted practice of military professionals. This customary international law expressed soldier's standards which were born on the battlefield and not standards imposed upon them by dilettantes of a different discipline. Undoubtedly, the practicality of these rules led to their general acceptance which in turn was responsible for their codification. Such practical rules were understood and

enforced. Following the war crimes trials at the conclusion of World War II, "political" implications intruded into what had previously been a largely apolitical area. The very word "war crimes" became politically repulsive. Countries such as the United States, while upholding their international obligations, refused to label misconduct on the battlefield "war crimes" if it could be handled domestically under some common law crime. Breaches of international standards were treated as internal disciplinary matters. Legal standards, appearing under the commonly used label -- "law of war", became more idealized and less practical. Apolitical soldiers, sensing a political pitfall, began to shun what was once the accepted practice of professionals. Modern law of war is driven by an idealistic internationally minded community. The soldier sees his iron law of war "sweetened", "lawyerized", "politicized", "third world-ized", and made much less practical.

If the international standard is inarticulate, then certainly a soldier should expect his domestic standard ultimately expressed in the Uniform Code of Military Justice to practically assist him. Unfortunately the movement on the domestic law side has been toward civilianizing the Uniform Code of Military Justice. It may be that the country no longer has a soldier's code but a civilian code for soldiers. The Code codifies, with minimum necessary allowances for the needs of the military services, civilian criminal law. The wisdom of civilian law never really contemplated the judging of criminal actions in battlefield related circumstances. "Soldierly needs," especially those which run contrary to everyday social standards, should be clearly enunciated. Unfortunately they are not.

If there is a lack of practicality in the international standard and if that lack of practicality is coupled with silence in our domestic standard, then there should be genuine cause for alarm. If soldiers do not know what is expected of them, they are unable to articulately teach and require compliance with vague, unarticulated, impractical standards. Even worse, they will have no way to make these vital matters a part of their professional discipline. This paper examines both the international and the domestic aspects of expected command behavior in combat in an effort to replace these "ifs" with understanding.

CHAPTER I

ENDNOTES

* I wish to publically state my appreciation to Colonel Zane E. Finkelstein, JAGC, for his support and assistance with this project. Without his "prodding," it would never have been undertaken. His willingness to share his wealth of knowledge provided an invaluable "sounding board." His respect for and love of the English language insured a more polished product. His zeal in articulating the need to harmonize the international law with the vital requirements of commanders is contagious. Of course, I alone am responsible for any errors of "commission or omission" in the content of this essay.

1. US Department of the Army, Army Pamphlet 27-1-1: Protocols to the Geneva Conventions of 12 August 1949, p. 122.

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, convened by the Swiss Federal Council, held four sessions in Geneva (from 20 February to 29 March 1974, from 3 February to 18 April 1975, from 21 April to 11 June 1976 and from 17 March to 10 June 1977). The object of the Conference was to study two draft Additional Protocols prepared, after official and private consultations, by the International Committee of the Red Cross and intended to supplement the Four Geneva Conventions of 12 August 1949

This Pamphlet contains the text of these Protocols. Hereafter referred to as "DA Pam 27-1-1, Protocols."

CHAPTER II

THE WHAT, WHY AND RIPENESS OF COMMAND CRIMINAL RESPONSIBILITY

A. Definition of Command Criminal Responsibility

Command criminal responsibility — what is meant by that phrase? Although historically blurred, command criminal responsibility means specific criminal responsibility of the commander and not the general responsibility of command.¹ Command criminal responsibility is an articulation of an axiom of Justice Oliver Wendel Holmes in describing law as "a statement of the circumstances in which the public force will be brought to bear upon men through the courts."² Command criminal responsibility goes beyond personal felonious acts. It assumes that a commander does not issue illegal orders or in some way personally direct or supervise a prohibited activity for such conduct would make the commander a personal participant. It is not personal participative criminal activity but criminal responsibility for the actions of subordinates or for command decisions affecting others. Command criminal responsibility does require criminal misconduct by the commander and cannot be equated with everything improper that occurs within a command.³

Command criminal responsibility, as the name implies, means criminal and not administrative responsibility. We are not speaking of poor leadership or of an ineffective trainer. Commanders can be reprimanded,

relieved, and politically or historically censured for conduct that is not criminal. Neither are we talking about imputed criminal responsibility which has been so publically and emotionally misargued by persons misusing impressive credentials.⁴ Command criminal responsibility for actions of subordinates requires personal involvement, connection, knowledge, or intent. Civilized nations in their criminal law require personal involvement. Vicarious punishment is repulsive to a civilized society. As noted above, command criminal responsibility does not require that the commander personally commit the offense, that he ordered it to be done or that he enunciated a policy requiring others to do it. He would under these circumstances be responsible not just as a commander but as a principal. Command criminal conduct is based on breach of a duty. That breach must "contribute" to the crime in two ways. The breach of that duty must be a direct link or proximate cause of the misconduct. "But for" the breach of duty there would have been no crime. Lastly, and very importantly, the commander generally must have the ability to prevent the crime.

In addition to these traditional requirements, there is a new and radical aspect of command criminal responsibility under active discussion. Under the proposed Protocols, a commander would be criminally responsible if he wilfully employed force in a grossly disproportionate manner.⁵ The actions of the commander personally, indeed his very value judgments, would be at issue.

A non-military example of the traditional requirements may be illustrative. Assume for a minute that a patrolman on the streets of New York City, while being jostled by a crowd, unexpectedly pulls his service revolver and shoots a number of innocent bystanders. What is the criminal responsibility of the police commissioner? He may be

remiss in the performance of his duties if he has not insured that the particular patrolman received the necessary schooling. Indeed, he may be such a poor administrator that he should be censured or fired. But the question is, is he criminally responsible, in any way, for that particular act? Certainly if this police commissioner had received reports of one or two similar incidents and did nothing about them, then he might be criminally responsible for he would have breached his duty to control his patrolmen. His inaction after being made aware of a series of incidents would amount to a concerted policy and active encouragement to commit similar illegal acts.

B. Why Examine Command Criminal Responsibility?

1. The Military needs practical guidance.

In the aftermath of World War II and with the conclusion of the Vietnam War, our country needs a clear position regarding command criminal responsibility. Is our country ready to impute criminal responsibility to commanders without an evidentiary showing that they had knowledge of the event and had the physical ability to do something about it? Are we prepared to risk the professional reputation of our military and our country's good name on the altar of a "war crimes trial debate" when a commander orders an attack that some politically motivated "Monday morning quarterback" would say was wrong? Are we willing to have command criminal responsibility resolved by publicity seeking politicians, ambitious prosecutors, unguided judges, or untutored vengeful citizens (perhaps even those of our enemy)? In this troubled world so filled with potential conflict, are we prepared to forego the preventive function of the law that the articulation of a standard produces? Knowledge of a standard should become the goal for compliance and would

allow normal training to insure its corporate understanding.

It is important to have this issue discussed and resolved at a time when our country is not faced with a particular problem and at a time when pressures to arrive at a politically expedient solution are not present. The diverse voices of reason must be allowed the freedom to express themselves. Such a clarification would be a shield to protect commanders as well as a sword for their prosecution. In a nutshell, our country needs to arrive at a position regarding command criminal responsibility in a calm, deliberate, detached manner unaffected by a particular incident.

2. We are a nation and a people governed by law.

Our forefathers began an era of world revolution in our War of Independence. Our revolution, which inspired and changed the world, was a revolution of ideas and not of people. Our concepts of liberty, of equality, and of justice set the world on fire. The hallmark of our people became a respect for the rule of law. This tradition is also an important part of our military heritage. A part of this proud tradition for the American Army is the Lieber Code of 1863.⁶ President Abraham Lincoln, on his own initiative, commissioned Professor Francis Lieber, the father of a future Judge Advocate General, to draft the first code dealing with prisoners of war. This Code, which required humane treatment for prisoners of war, served as a model for countries throughout the world. It has been characterized as "not only the first but the best book of regulations on the subject ever issued by an individual nation on its own initiative."⁷ Although little known and unheralded, that same tradition continued through the Vietnam conflict. The regulatory scheme used by the American Army in Vietnam to identify, to inves-

tigate, and to report war crimes is studied as a model in the community of nations. In commenting upon this directive, the International Committee of the Red Cross delegate to Saigon stated:

The MACV instruction . . . is a brilliant expression of a liberal and realistic attitude . . . This text could very well be a most important one in the history of the humanitarian law, for it is the first time . . . that a government goes far beyond the requirements of the Geneva Convention in an official instruction to its armed forces. The dreams of today are the realities of tomorrow, and the day those definitions or similar ones will become embodied in an international treaty . . . will be a great one for all persons concerned about the protection of men who cannot protect themselves . . . May it then be remembered that this light first shone in the darkness of this tragic war of Vietnam. [Emphasis added]⁸

Our military tradition of respect for the law is well summarized in a quotation that appeared on the first page of a book marking the two-hundredth anniversary of the Army Judge Advocate General's Corps:

War has been said to be an impersonal thing, and in many respects it is. However, armies are necessarily composed of human beings -- who perform or influence the performance of great actions; who bring new growth and new challenge; and who have the capacity to leave a legacy of honor, hard work and respect for the law.⁹

This tradition coupled with our respect for the rule of law demands an expressed, articulate, acceptable, workable and practical standard of command criminal responsibility.

3. Command responsibility is the heart of military professionalism.

The distinguishing characteristics of a combatant are four in number: (1) commanded by a person responsible for his subordinates; (2) has a fixed distinctive sign: be uniformed; (3) carry arms openly; and (4) conduct operations in accordance with the laws and customs of war.¹⁰ A responsible commander heads the list. A combatant is not always a "professional," yet even here international rules underscore responsible leadership. The American soldier is much more than a combatant. He

stands proudly before his countrymen and proclaims that he is a professional. His professionalism is based on two ingredients. The first ingredient is discipline. The second ingredient is the trained and restrained use of deadly force. Indeed, a doctor who has a cancer patient on the operating table will very carefully extract from that patient the cancer using every amount of professional skill and knowledge that he possesses. He does his utmost to insure that when that cancer is removed as little harm as possible is done to the patient's body. The same is true with the soldier, only his task is more difficult. His government calls upon him to remove a political cancer. Unlike the doctor, he must rely upon the discipline and training of the men under his command to execute his exacting requirements. Controlling others through training, discipline and supervision, he removes that political cancer doing the least damage possible to the body politic. Hence the very heart of military professionalism is command responsibility. Essential fundamentals cannot be assumed, remain inarticulated, or be temporarily malleable. It is in the interest of the military professional to require an exact "consent form" from the government requiring the "military-political surgery." His duties and responsibilities should be clearly delineated in advance.

C. The Timeliness of Debating Command Criminal Responsibility

Public issues must await their time. Politics is the art of the possible. Public interest dictates the political agenda. Some subjects are untimely; others are too emotional or situation centered for long term resolution. In short, the "time" must be right. Several factors indicate that now is the time to debate and resolve the issue of command criminal responsibility.

1. Appropriate passage of time since the Vietnam War.

The emotional experience of Vietnam for years paralyzed or froze any progressive discussion of command criminal responsibility. Intellectual camps, warring with pen and paper, rarely listen to each other as they try to "checkmate" their "political" opposition.¹¹ Emotion also hinders flexible judgment. Only recently has there been indication of a more balanced approach which is so necessary to the movement of controversial, legally related ideas.¹²

2. The Third World Revolution has hit and may have mortally wounded the law of war.

It is obvious to the most casual observer that the accepted tenets of the established order have been badly shaken by the ideas, economic interest and collective power of the third world. In matters relating to the law of war, newly created governments insist that their interests were not represented in the earlier portions of this century when white colonial Europeans in diplomatically correct morning coats met in Baroque palaces to establish the rules for the proper conduct of warfare. These Marquis of Queensberry rules are rejected as irrelevant, impractical, or intentionally detrimental. The "have - have not" debate is especially acute with modern sophisticated military hardware and how it should be employed. A different and equally pernicious "political" ingredient threatens to undo the political consensus so necessary for the proper functioning of the law of war. This cancer can be easily seen in recent meetings of the International Committee of the Red Cross where large portions of the agenda were devoted to an irrelevant political "circus" often on who should be seated.¹³ In short, such conduct is an unhelpful polarization that detracts from the necessary consensus building process.

3. Evolving role of the military.

The purpose of the military is to prevent or to win wars. Yet in the nuclear age the professional military is beginning to be regarded as "conflict controllers." The American Army publically discusses concepts of conflict prevention, conflict control, and conflict termination.¹⁴ There is a realization that a modern war could result in the destruction of the very objectives desired to be preserved. There appears to be a searching for a means for nations to compete in lower thresholds of conflict. A clear understanding of the rules surrounding conflict would help in this regard.

4. Restoration of public confidence.

Nothing is more dangerous in a democracy than the erosion of the bond between the armed forces and the citizenry it serves. One of the festering sores of Vietnam concerned professional conduct on the battlefield. The professional military watched in bewilderment as one segment of the population condemned the most sensitive, difficult, and skillfully-executed of military combat operations as blatant war crimes. The other segment saw nothing wrong with the shooting of unarmed, unresisting noncombatants and condemned as unpatriotic and "unnatural" any attempt to discipline those who so obviously broke the rules. That bond of understanding must be rejuvenated before the professionalism of our armed forces is again a matter of public debate.

5. Isolation on the future battlefield.

Isolated small units under tremendous pressure and without customary guidance may well fight the next war. Resulting difficulties are a matter of experience in counterinsurgency operations. The "sophisticated" European battlefield with its high speed tactics, with its

electronic communications difficulty, and with its resulting chaos if tactical nuclear weapons are employed, point toward units as small as platoons fighting the "real" war. In such circumstances, basic discipline and a clear understanding of the rules of warfare are a must if the integrity of our Army is to be upheld.

6. We are being asked to ratify new Protocols.

We are being asked to take a major step in the law of war. The ramifications of this step are awesome. Commanders, and their civilian masters, would be required to demonstrate "good faith competence" in their value judgments regarding proportionality — that delicate and difficult middle ground between military necessity and the requirements of humanity. Willful failure to strike the correct balance would be a war crime. Vague concepts of "indiscriminate attack" and "excessive injury" will undoubtedly be debated with the possibility of Nuremberg-like war crimes prosecution threatened in the background. Should our country ascribe to these Protocols? If so, how may they be practically implemented? Disinterested silence by commanders would be disastrous.

7. "Internationalism" in the law of war may have hit its peak: the future could lie in articulating workable and acceptable domestic standards.

On a post Nuremberg battlefield, a "spade is no longer a spade." Countries shy away from even using the words "war crime." Instead, they use their domestic criminal law to resolve criminal misconduct on the battlefield. The Third World Revolution may have ended any collective progress and destroyed any consensus that ever existed in this fragile area. Serious consideration should be given to placing our major effort in articulating our domestic standard with the realization that history teaches that we can expect large numbers of the other countries of the world to emulate our example.

CHAPTER II

ENDNOTES

1. William H. Parks, "Command Responsibility for War Crimes," 62 Military Law Review 1, 2 (1973).
2. American Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909).
3. For an excellent, concise statement of command responsibility see, William V. O'Brien, "The Law of War, Command Responsibility and Vietnam," 60 Georgetown Law Journal, 605, 661 (1972).
4. Telford Taylor, Nuremberg and Vietnam: An American Tragedy.
5. DA Pam 27-1-1, Protocols, Art. 85, pp. 63-64.
6. US War Department, General Orders No. 100: Instructions for the Government of Armies of the United States in the Field. 24 April 1863.
7. J. Spaight, War Rights on Land, p. 14. Cited and discussed in Steven P. Gibb, "The Applicability of the Laws of Land Warfare to US Army Aviation," 73 Military Law Review 25, 26 (1976).
8. Waldemar A. Solf, "A Response to Telford Taylor's Nuremberg and Vietnam: An American Tragedy," 5 Akron Law Review 43, 52 (1972) quoting from Haight, Gardiner M., "The Geneva Convention and the Shadow War," U.S. Naval Institute Proceedings, September 1968, p. 47. The referenced Directive is Military Assistance Command, Vietnam Directive 381-46 of 27 December 1967. Annex A, 62 The American Journal of International Law, 766 (1968). See also, R. R. Baxter, "The Evolving Laws of Armed Conflicts," 60 Military Law Review 99, 106 (1973).
9. The Army Lawyer: A History of The Judge Advocate General's Corps, 1775-1975, p. 1.
10. These factors entitle a guerilla to prisoner of war status. See, US Department of the Army, Field Manual 27-10: The Law of Land Warfare, 61, p. 25. Hereafter referred to as "FM 27-10." This Manual provides "authoritative guidance to military personnel on the customary and treaty law applicable to the conduct of warfare on land" FM 27-10, par. 1, p. 3.

11. Taylor, Nuremberg and Vietnam: An American Tragedy. Solf, "A Response to Telford Taylor's Nuremberg and Vietnam: An American Tragedy," 5 Akron Law Review 43 (1972).

12. Guenter Lewy. American in Vietnam.

13. R. R. Baxter, "Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law," 16 Harvard International Law Journal 1 (1975). See generally, John N. Hazard, "International Law under Contemporary Pressures," 83 Military Law Review 1 (1979).

14. US Department of the Army, Field Manual 100-1, pp. 8-9.

CHAPTER III

COMMAND CRIMINAL RESPONSIBILITY

Logically, two broad categories appear when one considers command criminal responsibility.¹ The first category is long recognized but its contents and parameters are not well articulated. This category evolves around the concept of a commander being responsible for the control of his subordinates or of a commander being responsible for the discipline of personnel under his command. When a subordinate runs amuck, what are the commander's personal criminal responsibilities? Training is the prophylactic: command oversight is the required official function. The other category is a new concept with its genesis in the new proposed Protocols to the Geneva Conventions.² Rather than codifying existing international military practice as has been the custom in the past, these Protocols seek to establish a new humanitarian law of armed conflict. This new humanitarian law focuses on the criminal responsibility of a commander for certain combat crimes.³ This criminal codification flows from the old targeting concepts of necessity and proportionality. These new rules seek to give commanders uniform guidance and to require, under domestic criminal penalty, the exercise of combat military value judgments as decreed appropriate by the humanitarians who control the rules. This is the "ultimate" expression of command criminal responsibility, for a commander is to be held criminally responsible for his

personal, "value judgment," combat decisions.

A. Subordinate Misconduct

Perhaps the best method of studying the current state of the law and the deficiencies in the legal articulation of command criminal responsibility would come from an examination of the much discussed and misunderstood Medina case which was a part of the My Lai tragedy.⁴ This case, more than any other case in our legal history, is synonymous with command criminal responsibility. Hopefully, an examination of the facts coupled with the deficiencies that exist in the available prosecutorial theory will be instructive and will contribute to the post-Medina debate concerning command criminal responsibility.⁵

On the morning of 16 March 1968, Charlie Company, of Task Force Barker of the 11th Brigade of the Americal Division, conducted an assault in an area known as Pinkville in Quang Nai province in the Republic of South Vietnam. Captain Ernest Medina was in command of that company and was the senior commander on the ground. Lieutenant William Calley commanded the first platoon. Believing that they would meet stiff resistance from a Viet Cong battalion, Captain Medina gave his men a "pep talk" on the evening of 15 March 1968 prior to the assault the following morning. Captain Medina did attempt to prepare his men psychologically for the fierce fight that he expected the next day. The Government did not believe that Captain Medina, during that particular briefing, intentionally ordered his men to kill unarmed, unresisting, noncombatants. On the morning of 16 March 1968, the company landed outside of the village of My Lai (4). For all practical purposes, the helicopter-borne assault met no resistance. Once the company was on the ground, the three platoons began to make their sweep through the vil-

lage. The horrible events that followed in the course of the next three hours are now history. Several hundred old men, women, and children were systematically killed. Two particularly large groups were gathered together and executed by Lieutenant Calley and an enlisted man by the name of Paul Meadlo. Various other instances of individual killings occurred throughout the village area. The village was burned. Women were raped and otherwise sexually molested. Indeed, five hundred South Vietnamese may well have lost their lives.

During these particular three hours, Captain Medina remained on the outskirts of the village. No evidence placed Captain Medina at the scene of any of these killings. This incident occurred in dense jungle growth. However, since the area involved was approximately ten thousand square yards -- the size of some five football fields, the Government's position was that Captain Medina knew precisely what was transpiring and that he had the ability to issue orders stopping the slaughter and to seek help in controlling his men. In short, the Government felt that he had actual knowledge that unarmed, unresisting, noncombatants were being killed by men under his command. The evidence was clear that he had the communications ability to stop this carnage. He had two basic choices. He could have taken affirmative action, for example, issuing orders or seeking help to control his men. Seeking assistance would, of course, have reflected poorly on his military leadership ability. The other course of action would be to remain silent and hope that the incident would be relatively insignificant and would not be discovered. Apparently, he chose his military career over the lives of five hundred unarmed, unresisting, noncombatants who were being slaughtered by his troops within earshot. His crime, in the Government's eyes, was abandoning his command responsibility on the battlefield.⁶

As can be seen, the Medina case was a case of non-feasance — command inaction in the control of subordinates who were committing atrocities. Had there been credible proof that he ordered this carnage, the legal theory would have been clear. In that case he would have personally participated. He would have been what the law calls a principal. Hence, the Medina incident is a classic case of command criminal responsibility. His involvement in this incident and his knowledge of it was based upon circumstantial evidence — a factor likely to be repeated in future cases. The statute of limitations required a quick drafting and preferring of charges. In later examining the facts surrounding My Lai, the Government became suspicious when, almost without exception, the only people who alleged that Captain Medina had ordered the killing of noncombatants were soldiers who themselves had killed numerous women and children. In mid-October of 1970, the Defense requested a polygraphic examination for Captain Medina. The government examiner, as Mr. F. Lee Bailey later established on the record, was perhaps the most competent examiner in existence. This test concluded that Captain Medina "was truthful when he denied ordering or intentionally inferring to his company during his briefing of 15 March 1968, that non-combatants be killed" However, using a peak of tension technique, the same test concluded,

that Medina was not truthful when he denied knowing that his company had killed numerous non-combatants at My Lai (4) prior to 0930 hours, 16 March 1968, and was aware that his company was killing numerous non-combatants at My Lai (4) between the hours of 0730 and 0900, 16 March 1968.

Captain Medina admitted that after an initial radio message he had no reason to believe My Lai (4) was contested by the enemy and that he had lost control of his company. He also admitted that he had not issued a

cease fire order for nearly three hours after the assault began. The Government's obligation was both clear and complex.

1. Duty to Intervene.

Self-evident common sense dictates that a responsible commander must control his troops. Control includes as a minimum a duty to interfere if they behave improperly. This duty would also encompass a requirement to supervise — a duty to find out what is transpiring. There is no room in the concept of command for a "stick your head in the sand" approach.

Action is the fundamental principle of the criminal law. A person who acts contrary to the clearly articulated accepted norms of society will be punished. Commission, contrary to the rules, and not omission drives the criminal law. Since criminal omission is unusual, criminal acts grounded in inaction should be even more carefully defined. Making an overt act criminal is one thing; sending someone to prison for passive conduct is quite another. Criminal inaction is usually based upon a breach of a legal duty. Logic would dictate that such a duty should be painstakingly articulated. Fundamental fairness would seem to demand it. Where is the definition of the duty which embodies the cornerstone of responsible command? Where is the explanation of the consequences of such a breach? Surely such an important matter should not only be articulately expressed but carefully taught to each officer siezed with or aspiring to such duty. Frighteningly, such is not the case.

A search by the Medina prosecutors revealed no direct statement of this duty. They found no clear articulation of the principle and were forced to weave and to modify isolated portions from dated military field manuals and to rely upon tangential dicta by the military courts. Shockingly, a commander's responsibility had to be boosted by "boot-

strapping" his individual responsibility on top of his command responsibility to give it more depth.⁸ The Trial Judge in a later public discussion of his legal analysis of the case, noted that "there is no applicable common law theory establishing a duty by a commander to interfere." In his judgment, "the international law which by adoption becomes domestic law does place such a duty" on commanders.⁹ Since Judge Howard's articulation of this duty in his instructions to the Medina court members is a comprehensive domestic statement, it is worth quoting:

In relation to the question pertaining to the supervisory responsibility of a Company Commander, I advise you that as a general principle of military law and custom a military superior in command is responsible for and required, in the performance of his command duties, to make certain the proper performance by his subordinates of their duties as assigned by him. In other words, after taking action or issuing an order, a commander must remain alert and make timely adjustments as required by a changing situation. Furthermore, a commander is also responsible if he has actual knowledge that troops or other persons subject to his control are in the process of committing or are about to commit a war crime and he wrongfully fails to take the necessary and reasonable steps to insure compliance with the law of war. You will observe that these legal requirements placed upon a commander require actual knowledge plus a wrongful failure to act. Thus mere presence at the scene without knowledge will not suffice. That is, the commander-subordinate relationship alone will not allow an inference of knowledge. While it is not necessary that a commander actually see an atrocity being committed, it is essential that he know that his subordinates are in the process of committing atrocities or are about to commit atrocities. [Emphasis added]¹⁰

Unfortunately the passage of ten years since these instructions were given has resulted in no domestic progress in the articulation of a commander's unique duty to interfere. The Uniform Code of Military Justice is silent. The Manual for Courts-Martial does not mention this duty and only tangentially brushes the issue.¹¹ On the rare occasions when the military courts have been faced with cases involving the

uniqueness of officers, their pronouncements have been brief, conclusory, and non-definitive.¹² Analogous situations in the common law are almost non-existent. Relevant cases relate to special circumstances for individuals enforcing the law¹³ or for persons with close relationships.¹⁴ Military manuals which should express the custom of the service are also disquietingly silent. Particularly troubling is the silence of Field Manual 27-10, The Law of Land Warfare, which provides "authoritative guidance to military personnel on the customary and treaty law applicable to the conduct of warfare on land . . .".¹⁵

However, some progress in the international articulation of the duty of commanders comes in Article 87 of the proposed Protocols. Governments are obligated to require commanders to prevent, to suppress, and to report breaches of the basic Conventions and of the Protocol. Governments must also require commanders, commensurate with their level of responsibility, to ensure that soldiers under their command are aware of their obligations under the Conventions and the Protocol. In the relevant third paragraph, governments are to require:

. . . any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and where appropriate, to initiate disciplinary or penal action against the violators thereof.¹⁶

Note the use of the word "aware" which connotes actual knowledge, a matter to be discussed in the next section. The affirmative duty to actively supervise those under his control is stressed.¹⁷ A commander has a duty to initiate appropriate steps if he is aware of a breach or of an intended breach. It should also be observed that this Article applies "to any military person who has members of the armed forces under his command."¹⁸ Hence, it was drafted to include non-commissioned

officers but only requires soldiers to act within the scope of their command authority. The drafters felt that this "language does insulate commanders more effectively from frivolous or politically motivated war crime allegations."¹⁹ Implementation or domestic articulation, obviously, is required.

Such a fundamental concept screams to be articulated. Must we wait until we are faced with an embarrassing incident to hurriedly, under pressure, and with incident myopia formulate a legal articulation designed to be a part of a prosecution's case? If this is a valid legal principle, why as a measure of professionalism is not every new officer and non-commissioned officer taught about the unique duty imposed upon him?²⁰

2. Knowledge.

The issue, both factually and legally, in the Medina case was knowledge. What did he know and when did he know it? This fundamental question will undoubtedly be the central issue in cases involving command criminal responsibility. Factually the framing of this issue has been presented above.²¹ Legally this issue evolved around the cursory, unamplified subordinate clause of one of four sentences of the FM 27-10 paragraph entitled "Responsibility for Acts of Subordinates in the Law of Land Warfare:"

The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violator thereof. [Emphasis added]²²

An amplification of the words "should have knowledge" would have prevented much legal difficulty and would have eliminated many untutored

attacks on the so-called "flawed" instructions of the court which supposedly were a part of a conspiracy by the Army to whitewash the My Lai incident by propounding different standards for itself than it required of conquered foes after World War II.²³ The real irony is that this "should have known" standard was considered "too broad" and "would subject the commander to arbitrary after-the-fact judgments concerning what he should have known" by the international community when they drafted the article concerning a commander's failure to act.²⁴

Knowledge is and will continue to be the primary issue in cases involving command criminal responsibility.²⁵ A person with the power of life and death over others must — if life is fair — be accountable for his acts. Yet, fairness in determining criminal accountability would also require some personal involvement on the part of the commander. This personal involvement is often expressed as "guilty mind," "mens rea," "intent," "design," or any number of nouns denoting involvement. "Knowledge" is the umbrella often used to express this concept. Courts will scrutinize the peculiar circumstances of "linkage" because of the unusual nature of criminal offenses based upon inaction. Popular pressure, both from the public and within the military, will be to "find a responsible commander." The tension between these two often divergent requirements produces the "knowledge debate."

The unhelpful inarticulateness of the "should have known" standard is distressingly obvious. One expert publically stated that,

... if one were to apply to Dean Rusk, Robert McNamara, McGeorge Bundy, Walt Rostow and General William Westmoreland the same standards that were applied in the trial of General Tomoyuki Yamashita 'there would be a very strong possibility that they would come to the same end as he did.'²⁶

Such apparently politically motivated rhetoric seeking a responsible "scapegoat" represents a dangerous near-vicarious liability standard.

The public is left to deduce from this trumpeted expert that General Yamashita was convicted without having knowledge that his subordinates were committing atrocities and that American generals and civilian leaders should be held to the same standard. An analysis of the Yamashita case reveals that there was in fact credible evidence of knowledge on his part.²⁷

The legal writers who have discussed the problem of knowledge have largely contented themselves with a jurisprudential historical trial.²⁸ One non-legal writer suggested that "a commander can be held liable for the actions of his troops if he knows of them or blatantly ignores and fails to take appropriate action."²⁹ The acknowledged controversy with this "blatantly ignores" standard is the lack of judicial guidance regarding "the degree of efficiency required from the commander in preventing war crimes, in discovering information about them, and in punishing wrongdoers."³⁰ "Blatantly ignores" does not take into account the "foreseeability," and the "reasonableness under the circumstances" required in negligent instances of command dereliction.³¹

Captain Medina was charged as a principle to murder. He was not charged with dereliction of duty because of the statute of limitations problem and because dereliction of duty was an unattractive offense for such a serious incident. In this case of inaction, "knowledge" was the link of the suspect to the offense. The Prosecution took the position that for intentional homicide offenses "knew or should have known" meant actual knowledge. Such actual knowledge could, of course, be proven by circumstantial evidence. The Judge instructed:

. . . this required knowledge on the part of the accused, like any other fact, may be proved by circumstantial evidence; that is by evidence of facts or circumstances from which it may be justifiably inferred that the accused (had) such knowledge.³²

From the mosaic of factual evidence presented, which was extensively summarized by the Judge,³³ the members of the court were to determine if actual knowledge was present. The use of the actual knowledge test has been much criticized.³⁴ One articulate scholar noted: "The actual knowledge test, in a context like My Lai, is an invitation to the commander to see and hear no evil."³⁵

The debate concerning the meaning of the mercurial "should have known standard" may well have been resolved in an unexpected forum. The relevant paragraph of Article 86 of the proposed Protocols entitled Failure to Act states:

2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.³⁶

The analysis concedes that this proposed Article is not as "strong" as the "should have known" test. It notes that the new standard is "more narrow" and "requires some showing that specific information was available to the commander which would give him notice of the breach."³⁷ Interestingly, many delegates argued that the should have known test "was too broad and would subject the commander to arbitrary after-the-fact judgments concerning what he should have known."³⁸

Once again domestic augmentation is necessary. The lessons resulting from past inarticulation simply must be corrected. The issue of knowledge will be the fulcrum in any future trial. Accordingly, the knowledge expected of an officer or of a non-commissioned officer must be precisely defined, especially in light of much public misunderstanding.³⁹

3. Possible Violation of the Criminal Law.

The civilian oriented Uniform Code of Military Justice does little to assist in legally categorizing possible breaches of command responsibility. No Article of the Code concerns the battlefield responsibility of a commander. The Manual for Courts-Martial is equally and painfully silent. One must make the legislatively expressed ancient common law work, although it teaches little regarding the terrors and the pressures of the battlefield. This recognized deficiency has lead some to suggest that the military needs a separate code applicable to combat violations.⁴⁰

Breach of a commander's duty usually falls into two broad categories: (1) willful or; (2) negligent. Negligence, of course, can be performing a duty in a culpably inefficient manner as well as a failure to perform that duty. Willful violations arise when a commander joins or associates himself with the improper acts of his subordinates. A commander could be more or less culpable than his subordinate. In willful violations he must be actively involved. In the words of Article 77 of the Code, he must aid, abet, counsel, command, procure or cause. In short, his action or inaction must link him with the misconduct. He must designedly encourage or protect the perpetrators. By contrast, dereliction of duty, in violating Article 92 of the Uniform Code of Military Justice, indicates that a person may be derelict in the performance of his duties when he wilfully or negligently fails to perform them or performs them in a culpably negligent manner. Here the focus is on the commander and his breach of duty. No attempt is made to link him as a principle with the conduct of others. Two problems make dereliction of duty an unattractive prosecutorial choice. The current

maximum punishment applicable to enlisted members is a mere three months confinement at hard labor with forfeiture of two-thirds pay per month for three months. This is not exactly the sort of offense one would choose for battlefield homicides. In addition, a two year statute of limitations is applicable.⁴¹ This is not an insignificant problem if there has been a "cover-up."

The Medina case demonstrates the worst of these problems. The Prosecution contended that Captain Medina was guilty of murder as a principle. By his inaction in intentionally failing to intervene after learning that innocent noncombatants were being killed, he caused the death of not less than one hundred Vietnamese. In the Prosecutor's eyes this was a calculated act of murder. The Judge, however, excluded the intentional aspects and reduced the "negligence" to that of culpable negligence found in involuntary manslaughter. This action has been articulately criticized as depriving the jury of permissible alternative routes to conviction involving intentional homicide offenses.⁴²

A criminal trial is an attempt to prove that an individual violated an understandable section of the criminal law. Prosecutors should spend their time gathering facts and not attempting to articulate a theory of prosecution. Articulating what is a breach of the criminal law is a legislative not an executive or prosecutorial function. The mixture of such functions is illegitimate and dangerous. Our country and our armed forces need a specified section of the criminal code which would leave to the military judicial system only the task of seeing if the facts supported the charge.

B. Personal Actions and Decisions

1. Traditional Concepts.

Commanders have long been expected to perform certain battlefield functions and to take certain actions in combat. When these items are enumerated by legal advisors, commanders, who agree with that advise, often exclaim: "But that's not a legal matter!" The "law" to them so reflects what professional soldiers expect that it ceases to be a "legal requirement" or to be a matter within the providence of a lawyer. Were that all the rules dealing with the battlefield were so in harmony with accepted practice! There are five basic areas which should be taught and given emphasis by every serviceman who leads others:

a. Professional training. The personal and collective discipline that comes from hard, challenging, and meaningful training is the first ingredient of a professional soldier. A well trained, disciplined, and motivated soldier will behave correctly under stress. The discipline this training induces makes him a professional and sets him apart. It insures professional conduct on the battlefield.

b. Know, understand, and enforce compliance with the rules of engagement. These rules set forth the manner in which conflicts are to be fought. Any unusual "legal requirements" will more than likely be incorporated.

c. Insist on compliance with standard operating procedures. In times of crisis, emotion and pressure, a disciplined, well-thoughtout standing procedure will often "save the day." Such procedures follow the reasoned path of others.

d. Control of subordinates. Subordinates should be controlled with the issuance of clear, concise orders. Superiors should actively intervene at the first sign of ill-discipline.

e. Insist upon the truthful, moral "high road" A commander by "thought, word and deed" must convey to his subordinates that he expects them to appropriately exercise their Judaic-Christian common sense.

In addition to these almost self-evident areas of emphasis, a commander needs to actively supervise certain "trouble spots." He needs a system to insure that these "trouble spots" are handled professionally. The rationale for such a system should not be because it is a legal requirement but because it is the expected conduct of a disciplined, professional soldier.

a. Watch the forbidden T's — targets, tactics, and techniques. Commanders should insure that their subordinates know who and what to target, know the expected tactics, and know the acceptable techniques to accomplish the objective. A negative approach is probably the easiest. Don't target noncombatants, protected property, or shoot at medical service symbols. Don't use poison or poisoned weapons. Don't alter your weapons to increase suffering. But positive statements of military objectives is more in keeping with United States military practice.

b. Watch the process of capturing enemy soldiers. Insure that they are allowed to surrender, are treated correctly and humanely, and are not impermissively interrogated.

c. Insist upon respect for civilian and private property.

d. Know what to do when crimes are committed and do it! Insist upon supervision. Seek the prevention of criminal acts.⁴³

Most soldiers would say that these "lessons" are obvious, and they are. Yet disciplined attention to detail in these "basic" areas will

almost guarantee that a commander will have no "problems" on the battlefield.

2. The New "Humanitarian" Law of Armed Conflict.

International developments in the law of war in the 1970's have concentrated on the articulation of what have previously been judgmental guidelines. The "restatement," it was felt, would give uniform guidance and would put "teeth" into the exercise of military value judgments. In effect, international lawyers have attempted to draft guidance for later domestic criminal law implementation of the long practiced soldierly concepts of necessity and of proportionality. The heart of these so called "combat offenses" concern the methods and means of warfare and the protection of civilian populations and civilian objectives is found in the third paragraph of Article 85 of the Protocol. An examination of its terms imparts the flavor of this proposed requirement.

. . . the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:

- a. making the civilian population or individual civilians the object of attack;
- b. launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects . . . ;
- c. launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects . . . ;
- d. making non-defended localities and demilitarized zones the object of attack;
- e. making a person the object of attack in the knowledge that he is hors de combat;
- f. the perfidious use . . . of the distinctive emblem of the red cross, red crescent or red lion and sun or

of other protective signs recognized by the Conventions or this Protocol.⁴⁴

No professional soldier would be surprised by the concepts articulated in this Article, for such admonitions have long been a part of his thinking and planning. It is the "lawyerization," "criminalization," and the "politicalization" of the most important value judgments he is called upon to make that is shocking. The Protocols require that legal advisers be available to advise commanders.⁴⁵ Presence of lawyers does two things. It helps to insure a knowledge of the law -- indeed may even help impute it. It also silently suggests an infusion of methods used by the legal profession -- "the legal paper system" which meticulously and ponderously prepares either to avoid or to pursue litigation. In our military bureaucracy every judicial adverse action depriving a person of liberty or of property is recorded in some written fashion. Will monumental battlefield decisions require less? Would commanders now be expected to prepare "legal paperwork" every time they plan an attack? How else will they be able to demonstrate "good faith" and articulate, perhaps years later, the facts that were known to them? Will every politically motivated discussion of battlefield tactics be in criminal terms? Since "grave breaches" are regarded as "war crimes,"⁴⁶ the international politicalization of any allegation can be assured. Will fear of trial for the value judgment based concept of "indiscriminate attack" and "excessive injury" prolong conflict and even cause the use of more devastating means and methods of warfare by leaders who would otherwise be willing to go to the conference table?⁴⁷ Will codification of the concept of proportionality be used politically by the victor over the vanquished to punish former enemies?⁴⁸ Is this entire concept a "ruse" or a disguised first step toward the outlawing of

certain types of weapons, currently nuclear weapons?⁴⁹

If our country subscribes to these Protocols, implementation becomes all important. Commanders are entitled to clear notice. The suggested approach of our Government is shocking and, in my judgment, unacceptable. It is suggested that "the approach of incorporating by reference in a federal statute the violations specified in the grave breaches provision appears to be a better one at this time."⁵⁰ Such an approach is a legal "head in the sand" attitude. Is the burden of lack of domestic consensus and of ambiguity to be born by soldiers personally and by their cherished professional reputation? Such a result is unacceptable. Articulate notice must be drafted. A practical "system" for recording fresh value judgments must be devised. Anything less is a "cop out" which may well mean the "end" of serious attention to the law of war by practical soldiers.

CHAPTER III

ENDNOTES

1. Appropriate organization of diverse material is always a problem. I have chosen to subdivide command criminal responsibility into a commander's responsibility for subordinate misconduct and for personal actions and decisions. Future articulation could use other organizational forms. The "law" may be more comfortable with the distinction of commission and omission or malfeasance and misfeasance.
2. See generally, DA Pam 27-1-1, Protocols.
3. Ibid., Art. 85, p. 63-64. Article 85 (3) is the heart of the new "combat crimes."
4. Captain Ernest L. Medina was acquitted on 22 September 1971 of charges alleging his misconduct during the My Lai massacre on 16 March 1968.
5. See for example: Roger S. Clark, "Medina: An Essay on the Principles of Criminal Liability for Homicide," 5 Rutgers-Camden Law Journal 59 (1973). Kenneth A. Howard, "Command Responsibility for War Crimes," 21 Journal of Public Law 7 (1972). Guenter Lewy, America in Vietnam, pp. 359-362.
6. The author was the Chief Prosecutor in the Medina case. See, W. R. Peers, The My Lai Inquiry. Norman G. Cooper, "My Lai and Military Justice - To What Effect?" 59 Military Law Review 93 (1973). Sources of questionable accuracy include: Seymour Hersh, My Lai 4 and Richard Hammer, One Morning in the War. Statements made to investigative reporters were often at great variance with statements repeated to prosecutorial officials and with testimony given under oath. See also, F. Lee Bailey, For the Defense, pp. 25-128. Mary McCarthy, Medina.
7. Polygraph Examination Report, Subject Medina, Ernest Lou, dated 25 November 1970, Case Control No. 70-CID011-00013 signed by Robert A. Brisentine, Jr., Examiner. This report is in the files of the Criminal Records Branch, US Army Investigative Records Repository, Fort Holabird, Maryland 21219. The conclusions of polygraphic examinations are inadmissible in Courts-Martial. Para. 142e, Manual for Courts-Martial United States, 1969 (Revised edition). Hence, the Prosecution could not seek admission into evidence of the results of the peak of tension test. The Prosecution, however, did make extensive use of the

oral statements of Captain Medina to Mr. Brisentine. Mr. F. Lee Bailey has publically contended for years that Captain Medina "passed" a polygraph examination. One of these latest pronouncements may be found in F. Lee Bailey, "In Defense of Military Justice," Army, November 1981, pp. 11-13. An examination of the record will demonstrate that the word "passed" must have a unique meaning to Mr. Bailey.

8. See Appendix A for the portion of the Prosecution Brief on the Law of Principals in United States v. Captain Ernest L. Medina detailing the duties of a combat commander. Franklin R. Wurtzel, as Assistant Trial Counsel, made a valuable contribution to the ideas and wording expressed therein.

9. Howard, "Command Responsibility for War Crimes," 21 Journal of Public Law 7, 21 (1972).

10. Instructions to the Court Members, United States v. Captain Ernest L. Medina. Appellate Exhibit XCIII. p. 18.

11. The Manual discussion of the law of principals contains an interesting paragraph:

While merely witnessing a crime without intervention does not make a person a party to its commission, if he had a duty to interfere and his noninterference was designed by him to operate and did operate as an encouragement to or protection of the perpetrator, he is a principal.

Manual for Courts-Martial United States, 1969 (Revised edition), Paragraph 156. The intended target was a governmental guard or a sentinel, hardly an explicit combat example. However, the analysis goes on to state: 'Inaction cannot be substituted for the required intent, although it may be evidence of that intent.' US Department of the Army Pamphlet, Army Pamphlet 27-2: Analysis of Contents Manual for Courts-Martial, United States 1969, Revised Edition, p. 158.

12. A military superior is responsible for the proper performance by his subordinates of their duties, United States v. Waluski, 6 USCMA 724, 21 CMR 46, 55 (1956). A senior prisoner of war in a Korean prisoner of war camp had the responsibility and the duty to take action, CM 374314, Floyd, 18 CMR 362, 366 (1955) (Pet. den.). An officer has a duty to intervene and stop illegal conduct by subordinates in watching "dirty" movies, United States v. Cowan, 12 CMR 374 (1953). An officer using an airplane for illegal transport has a duty to correctly clarify an ambiguous situation, ACM 8805, Anderson, 15 CMR 919 (1954). A disbursing officer has a duty to stop illegal activity. ACM 8289, Peterson, 16 CMR 565 (1954) (pet. den.). A guard on a prison detail has a duty to intervene and prevent one prisoner from committing sodomy upon another. CM 367552, Barker, 13 CMR 472 (1953). But see, United States v. McCarthy, 11 USCMA 758, 29 CMR 574 (1960) in which a Lieutenant passenger in a car, in this social setting, was not responsible for the larceny of hubcaps by enlisted co-passengers without proof of active involvement.

13. A train conductor is responsible for liquor being transported on his train: Powell v. United States, 2 F.2d 47 (4th Cir. 1924). See also, Collins v. United States, 65 F.2d 545 (5th Cir. 1933).

14. Husband wife: Wife stood by with drawn pistol while husband shot two neighbors; People v. Blackwood, 35 Cal. App. 2d 728, 96 P.2d 982 (1939). Man and mistress: Man fails to summon medical aid for his mistress when she collapses after taking morphine in the course of a drunken debauch; People v. Beardsley, 150 Mich. 206, 113 N.W. 1128 (1907). Parent-child: Mother's failure to stop beatings; Mobley v. State, 85 N.E. 2d 489 (1949). Parents fail to feed child and child starves to death; The Queen v. Bubb & Hook, 4 Cox Crim. Cas. 455 (1850); The King v. Gibbins & Proctor, 13 Crim. App. 134 (1918).

15. FM 27-10, par. 1, p. 3.

16. DA Pam 27-1-1, Protocols, Art. 87, p. 65.

17. Herbert J. Hansell, "Memorandum to The Secretary (Defense), Subject: Circular 175: Request for Authorization to Sign Two Protocols to the Geneva Conventions of 1949 for the Protection of Victims of War, p. I-87-5 (hereafter referred to as "Protocol Analysis"). The analysis of this subparagraph indicates:

This provision has been added to stress the commander's responsibility to take affirmative action in the supervision and control of members of the armed forces under his command or other persons who are under his control it is designed to provide a duty of commander to intervene when they are aware of a breach or a planned breach. The provision requires the commander to take reasonable measures in the supervision and control of his personnel so that if breaches are being permitted, he will become aware of them.

18. Ibid., p. I-87-6.

19. Ibid., p. I-87-3.

20. The duty discussed in this section concerns the duty of a commander to supervise and to control his subordinates. Commensurate with their levels of responsibility, commanders are expected to prevent, to suppress, and to report war crimes. This statement may be an unnecessarily narrow view of a commander's duty. Should this duty affirmatively state that a commander has a duty to fight his troops in accordance with professional standards? Should this duty include requirements to train soldiers regarding professional standards? Should active observation or "finding-out" be a requirement? What would be the consequences of breach of an "expanded" duty? In short, I have presented a more limited view of a commander's duty. In my judgment, clear and accepted articulation of this "narrow" duty is a necessary building block for any possible expansion of this concept.

21. See p. 18-21 *infra*.

22. FM 27-10, par. 501, p. 178.

23. Telford Taylor, "The Course of Military Justice," New York Times, 2 February 1972, p. 37. Lewy, American in Vietnam, p. 359-361.

24. DA Pam 27-1-1, Protocols, Art. 86, p. 65. Protocol Analysis, p. I-86-1.

25. See generally, United States v. Goldman, 43 CMR 711 (1970).

26. Solf, "A Response to Telford Taylor's Nuremberg and Vietnam: An American Tragedy," 5 Akron Law Review, 43, 43-44 (1972). These remarks were made by Telford Taylor.

27. Parks, "Command Responsibility for War Crimes," 62 Military Law Review, 1, 22-38 (1973). O'Brien, "The Law of War, Command Responsibility and Vietnam," 60 Georgetown Law Journal, 605, 625-627. (1972). Hart, Franklin A., Yamashita Nuremberg and Vietnam: Command Responsibility Reappraised, Naval Air War College Review, September-October 1972, p. 19-36. But see, Lawrence Taylor, A Trial of Generals: Hotta, Yamashita, McArthur.

28. Parks, "Command Responsibility for War Crimes," 62 Military Law Review, 1, 77-104, (1973); Paust, Jordan J., My Lai and Vietnam: Norms, Myths and Leader Responsibility, 57 Military Law Review 99, 175-185, (1972); O'Brien, "The Law of War, Command Responsibility and Vietnam," 60 Georgetown Law Journal, 605, 619-629, (1972).

29. Hart, "Yamashita, Nuremberg and Vietnam: Command Responsibility Reappraised," Naval War College Review, September-October 1972, p. 33.

30. Ibid., p. 34.

31. Paust, Jordan J., "The Barometer," Naval War College Review, January-February 1973, p. 103.

32. Instruction to the Court Members United States v. Captain Ernest L. Medina. Appellate Exhibit XCIII, p. 24.

33. This charge to the court members may be found in Joseph Goldstein, et. al. ed. The My Lai Massacre and Its Cover-up: Beyond the Reach of Law?, pp. 465-468, and in Howard, "Command Responsibility for War Crimes," 21 Journal of Public Law, 7, 8-12 (1972). Judge Howard's summary of the evidence surrounding the crucial question of knowledge is both accurate and concise. Since his paragraphs distill an entire record of trial, they are quoted in Appendix B.

34. See Note 23 *infra*.

35. Clark, "Medina: An Essay on the Principles of Criminal Liability for Homicide," 5 Rutgers-Camden Law Journal 59, 78 (1973).

36. DA Pam 27-1-1, Protocols, Art. 86, p. 65.

37. Protocol Analysis, p. I-86-2.

38. Ibid., p. I-86-1.

39. There is another limiting factor. Command criminal responsibility not only presupposes knowledge but the ability to intervene to prevent, correct or punish. (In the words of Article 87 of the Protocol, "to suppress and report to competent authorities.") Any future criminal articulation should include a defense of physical inability to determine what is transpiring or to control subordinates. Since modern communication is so efficient, consideration should be given to placing the burden of going forward with the evidence upon the accused.

40. Major General Walter D. Reed, Judge Advocate General, U.S. Air Force, made such a suggestion during a Law of War Panel published in 82 Military Law Review 3, 35 (1978). See also, Westmoreland, William C., GEN and Prugh, George S., MG, "Judges in Command: The Judicialized Uniform Code of Military Justice in Combat (A Draft Code Amendment)," 3 Harvard Journal of Law and Public Policy, 1 (1980). A Draft Code Amendment appears in the next issue: 4 Harvard Journal of Law and Public Policy, 199 (1981).

41. See Article 43, Uniform Code of Military Justice.

42. Clark, "Medina: An Essay on the Principles of Criminal Liability for Homicide," 5 Rutgers-Camden Law Journal 59, 72-77 (1973).

43. US Army Combat Arms Training Board, Training and Doctrine Pamphlet 27-1: Your Conduct in Combat Under the Law of War. This pamphlet is probably the most useful soldier's publication that I have seen. This booklet should be reissued in "hardcover." It should be given to every commander. Some commanders with whom I have served place this pamphlet in their anteroom where soldiers waiting to see them can read it. This obvious display of command interest was most productive.

44. DA Pam 27-1-1, Protocols, Art. 85, pp. 63-64.

45. Ibid., Art. 82, p. 62. See also, Levantor Norsworthy, "Organization for Battle: The Judge Advocate's Responsibility under Article 82 of Protocol I to the Geneva Conventions," 93 Military Law Review 9 (1981). William H. Parks, "The Law of War Adviser," 31 Judge Advocate General's Journal 1 (1980). G. I. A. D. Draper, "Role of Legal Advisors in Armed Forces," 202 International Review of the Red Cross 6 (1978).

46. DA Pam 27-1-1, Protocols, Art. 85 (5), p. 65.

47. Bert V. A. Roling, "Aspects of the Criminal Responsibility for Violations of the Laws of War," in The New Humanitarian Law of Armed Conflict, ed. by Antonio Cassese, Vol. 1, p. 289.

48. Bert V. A. Roling, "Criminal Responsibility for Violations of the Laws of War," in The New Humanitarian Law of Armed Conflict, ed. by Antonio Cassese, Vol. 2, p. 141.

49. Ibid, p. 143. The pertinent sentences prompting the reference are:

. . . The laws of humanitarian warfare also have a shadowy side. If we regulate war, we may contribute to a revival of the opinion that war is an honorable and reasonable affair, that it is even human and morally acceptable. As a matter of fact, we make and elaborate upon a lot of rules but, in the meantime, technology makes war uglier, more a matter of mass destruction, and more cruel. So there is a certain danger in elaborating humanitarian laws of war. But the positive value of elaborating the law of war prevails, primarily because it may contribute to the prohibition of nuclear warfare. . . . The prohibition of specific means and methods of warfare, and especially of the concept of 'disproportionality' and 'excessive suffering' which is inherent in nuclear warfare, is contributing to the slow development of the prohibitions of nuclear war. It was stated at the Diplomatic Conference that the discussion there dealt only with conventional warfare. But it would be silly to make rules forbidding 'excessive suffering' for small weapons only, and to accept 'excessive suffering' caused by big weapons. That would be such a schizophrenic attitude that, in the long run, if those rules are accepted, they will have an impact with respect to nuclear warfare, although they have not been intended to have that impact.

50. Protocol Analysis, p. I-85-21.

CHAPTER IV

RECOMMENDATIONS

A. Let's once again place commanders in the driver's seat regarding the rules of their profession

Lawyers should give back and commanders should accept the primary responsibility for the rules of engagement. The "law" of war should be deemphasized. The ethics of military professionalism should be stressed with particular emphasis given to professional conduct on the battlefield. Commanders need once again to develop and to make a part of their practical routine a sensitivity to the concepts which make them unique and special. The health of our civilization depends upon the professional application of these concepts. Professional soldiers need to talk about, formally teach, and absorb both by interest and by example discipline in its broadest context. Commanders should stress the conduct they expect on the battlefield. Subordinates should instinctively know what is expected of them. Commanders with extensive combat experience should freely discuss their experiences, for such discussions are the most effective means of teaching professional conduct on the battlefield.

B. Let's have lawyer's "do their duty" and articulately complete the coupling between international and domestic standards in the law of war

Compartmented, inexact, obscure manuals and little used regulations

or directives are unacceptable substitutes for a comprehensive, knowingly available, articulate Code or Courts-Martial Manual. Idealistic concepts must be made unquestionably practical. Unrefined incorporation by reference is an abrogation of responsibility and places upon some future soldier the burden of ambiguity as he faces criminal procedures which will undoubtedly besmirk his Army, his cause, and his profession. Define the duty expected of commanders! Articulate the boundaries within which criminal penalties will be exacted! Allow the natural preventive law functions to evolve which come from a clearly articulated and accepted standard!

C. Let's have a productive dialogue between practical commanders and idealistic lawyers

Our modern, dangerous world begs for an acceptable compromise between the need for security provided as a part of military necessity and the need for humanitarian kindness. The military professional must be even more of a "political surgeon" in removing political cancer from the body politic. Modern weaponry and technology make the lethality of modern warfare unimaginable. Ancient virtues of fitness, fidelity and discipline must be supplemental with sensitivity and technical competence. The trained and restrained use of deadly force requires even more professionalism on the part of our armed forces. The sensitive and interested attorney must offer practical advice in assisting the military professional to systematically express the rules and guidelines under which he is to operate. Lawyers must use their professional craft to help devise rules that will command the acceptance that respect for the law deserves. The resulting standards must clearly express complex ideas in such a manner that it will be helpful to soldiers of all ranks required to make instantaneous value judgements. Commanders must again

take interest in and shape the "jurisprudence" of their profession, while lawyers must listen so that they may assist in making practical and useful the rules of the military profession.

D. Let's rethink our training regarding professional conduct on the battlefield

Once in thirty years or so there comes a "time" to implement change. The probable implementation of the new Protocols has created that opportunity. The Uniform Code of Military Justice may have to be amended. The Manual for Courts-Martial changed. New executive orders, directives or regulations promulgated. Perhaps, at long last, there will be a tri-service manual on the law of war. What an opportunity to shift emphasis and stress practical professional conduct on the battlefield! What an opportunity to clearly articulate what is expected! What an opportunity to creatively change our training in the necessities of military professionalism!

Level of expertise and responsibility should be clearly addressed. Within a division the emphasis should be on professional conduct on the battlefield. The corps is the place for locating the newly proposed law of war adviser. This is the practical level for the review of war plans, for the direction of emphasis in rules of engagement and in standard operating procedures, and for the development of a system for recording facts and value judgments to support a commanders determination of necessity and of proportionality. Department of the Army should be concerned with formulation of practical regulatory systems. Two examples come to mind. Soldiers should never have to worry about the legality of the unaltered use of their weapons. The procedures for handling prisoner of war camps should be a matter of uniform regulation.

The lawyer's language must become the soldiers common law when such regulatory systems are being written.

There should be different training for different levels of command. Sergeants do not need the technical expertise of generals. The higher the rank the more "legally technical" knowledge should be required. Basic Branch Courses, Career Courses, Command and General Staff College, War College, and General Officer "Charm School" make logical steps for teaching increasingly more technical material. Reducing everyone to the same common denominator is stultifying. The lack of interest and absence of instruction within the Army system is cause for great concern.¹ Again, it is not so much legal concepts that need to be taught but professional military "common law." To witness the excitement on the faces of military students when they discover the depth, the richness, and the honorableness of their profession makes all the teaching preparation worthwhile. Such training is simply not being given to the officer corps. An underscoring of the historic professionalism of a military officer is the best insurance of professional conduct on the battlefield.

CHAPTER IV

ENDNOTES

1. Norsworthy, "Organization for Battle: The Judge Advocate's Responsibility Under Article 82 of Protocol I to the Geneva Conventions, 93 Military Law Review 9 21-22 at Note 24 (1980).

CHAPTER V

CONCLUSION

The drafting of new Protocols with the resulting debate concerning their adoption and possible appropriate domestic implementation provides a perfect opportunity to reexamine what the American people expect of their professional military. The quieting of the passions surrounding the Vietnam conflict allow a reasoned discussion of what has been learned in our experience in that difficult conflict. The failure of our Government to clearly articulate a domestic standard expected of soldiers has caused considerable misunderstanding, confusion, and embarrassment. That failure provides a dangerous vacuum in the vital area of a soldier's social contract with the citizenry he serves. Now is the time for soldiers to articulate the essential ingredients of their profession. With the help of sensitive lawyers, standards can be articulated that will allow soldiers to teach and to transmit more easily the basic "jurisprudence" of the military profession. This articulation will not only return to the soldier the central role in controlling his profession, but it will also further the goal of humanitarianism by helping to insure sensitive compliance with accepted soldierly rules of behavior. The more professional our armed forces the more likely that the goals of the humanitarians will be served.

EPILOGUE

This essay has sought to harmonize the need for control of violence articulated by visionary internationally minded lawyers with the need for security demanded by practical military professionals. This conflict is not a new phenomenon. Its unusually clear and concise articulation in a recent article is worth quoting. These quoted paragraphs began a plea for more "military" in military justice when the pressures of the battlefield were considered. A not dissimilar theme was presented in this study but in the context of internationally accepted rules of engagement. The pressing necessity for harmonizing the vital role of two professions in controlling the use of force on the battlefield is self-evident in our turbulent world dominated by almost unimaginable death producing technology.

There is a natural conflict between law and armed force. Both are competitors for authority. Each seeks in the name of sovereign to control and possibly eliminate acts and conduct which the other values highly. Each has a limited tolerance or respect for the institutions and doctrine of the other. One is essentially a restriction upon the exercise of power while the other is essentially the effective use of power. One places great store in how a goal is achieved, while the other focuses primarily on the fact of mission accomplishment. One seeks elimination of violence while the other employs violence on a broad scale. One uses sovereign power to minimize disruption and instability, while the other uses sovereign power to create both conditions elsewhere, with the intent of bringing peace through the imposition of the sovereign's will upon an opponent.

But there are some similarities as well. Both deal with matters deemed to be vital to the state. Each is concerned, albeit from a different perspective, with functions which are

hallmarks of national sovereignty and which every state is expected to provide for its citizens; stability, safety, and security. Thus both seek the preservation of the state and its society — but by quite contrary means and methods.

The competition between law and armed force is not new. It is probably as old as man, and certainly dates no later than the recognition that law, not executive discretion alone, may limit force.*

*Westmoreland, William C., General and Prugh, George S., Major General, "Judges in Command: The Judicialized Uniform Code of Military Justice in Combat, 3 Harvard Journal of Law and Public Policy 1, 1-2 (1980).

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APPENDIX A

The portion of the Prosecution Brief on the Law of Principals in United States v. Captain Ernest L. Medina detailing the duties of a combat commander is as follows:

A COMBAT COMPANY COMMANDER HAS CERTAIN UNIQUE DUTIES

A

A COMPANY COMMANDER IS RESPONSIBLE FOR CONTROLLING AND SUPERVISING HIS SUBORDINATES DURING COMBAT OPERATIONS

It has long been a custom of the service that, in general, a commander is responsible for the actions of his subordinates in the performance of their duties. This service custom was judicially underscored by Judge Latimer who stated in a concurring opinion, 'Military law recognizes no principal which is more firmly fixed than the rule that a military superior is responsible for the proper performance by his subordinates of their duties.' United States v. Waluski, 6 USCMA 724, 21 CMR 46, 55 (1956). For indeed, the responsibility of a commander for controlling and supervising his subordinates is the cornerstone of a responsible armed force. A commander must 'give clear, concise orders' and must 'be sure they are understood.' FM 22-100, Military Leadership, para. 59 (1 Nov 1965). 'After taking action or issuing an order,' a commander 'must remain alert and make timely adjustments as required by a changing situation.' FM 22-100, *supra*, para. 25.

A commander 'keeps informed on the situation at all times and goes where he can best influence the action.' FM 7-10, The Rifle Company, Platoons, and Squads, para. 1-6 (17 April 1970). 'Without undue harassment, he supervises his unit by checking on its progress in accomplishment of actions and orders.' FM 22-100, *supra*, para. 19. Stated succinctly, 'The successful commander insures mission accomplishment through personal presence, observation, and supervision.' FM 100-5, Operations of Army Forces in the Field, para. 3-7 (6 Sep 1968). The custom of the Armed Forces regarding command responsibility is well stated in FM 22-100, *supra*, para. 22: 'The military commander has complete and overall responsibility for all

activities within his unit. He alone is responsible for everything his unit does or does not do.' See also, FM 7-10, supra, para. 1-6. This command responsibility does not, of course, extend to criminal responsibility unless the commander knowingly participates in the criminal acts of his men or knowingly fails to intervene and prevent the criminal acts of his men when he has the ability to do so.

Military commanders may also be responsible for war crimes committed by their subordinates. 'When troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such a responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.' FM 27-10, The Law of Land Warfare, para. 501, pp. 178-179 (July 1956). See Army Subject Schedule No. 27-1, dated 20 April 1967, at. p. 24.

In addition to controlling and supervising his subordinates, an Army officer, due to his superior rank and senior position, must conduct himself in an exemplary manner. United States v. Fleming, 7 USMA 543, 23 CMR 7 (1957). In CM 374314, Floyd, 18 CMR 362, 366 (1955), (pet. den.) the Board of Review stated, '... As a commissioned officer of the United States Army, Colonel Keith, whether the senior American officer present in the particular camp or not, and although deprived of many of the functions and prerogatives of his office by his Communist captors, had the responsibility and duty to take such actions as were available to him (and if the senior officer present to exercise such command as he was able) to assist his fellow prisoners, to help maintain their morale, and to counsel, advise and, where necessary, order them to conduct themselves in keeping with the standards of conduct traditional to American servicemen.'

B

A COMPANY COMMANDER HAS CERTAIN RESPONSIBILITIES AS AN INDIVIDUAL, REGARDLESS OF HIS COMMAND POSITION

A combat commander has a duty, both as an individual and as a commander, to insure that humane treatment is accorded to noncombatants and surrendering combatants. Article 3 of the Geneva Convention relative to the Treatment of Prisoners of War specifically prohibits violence to life and person, particularly murder, mutilation, cruel treatment, and torture. Also

prohibited are the taking of hostages, outrages against personal dignity and summary judgment and sentence. It demands that the wounded and sick be cared for. DA Pamphlet 27-1, December 1956, p. 68. These same provisions are found in the Geneva Convention Relative to the Protection of Civilian Persons in Time of War. DA Pam 27-1, supra, p. 136. While these requirements for humanitarian treatment are placed upon each individual involved with the protected persons, it is especially incumbent upon the commanding officer to insure that proper treatment is given.

Additionally, all military personnel, regardless of rank or position, have the responsibility of reporting any incident or act thought to be a war crime to his commanding officer as soon as practicable after gaining such knowledge. MACV Directive 20-4, dated 27 April 1967, para. 5a. Commanders receiving such reports must also make such facts known to the Staff Judge Advocate, USMACV. MACV Directive 20-4, supra, para. 5b. It is quite clear that war crimes are not condoned and that every individual has the responsibility to refrain from, prevent and report such unwarranted conduct. While this individual responsibility is likewise placed upon the commander, he has the additional duty to insure that war crimes committed by his troops are promptly and adequately punished. FM 27-10, supra, para. 507, p. 182.

APPENDIX B

Judge Howard's summary of the evidence surrounding the crucial question of knowledge in United States v. Captain Ernest L. Medina is as follows:

A. For the Prosecution:

The following statements are prosecution representations and not my conclusions as to the state of the evidence but the prosecution alleges that Captain Medina was the company commander of Charlie Company, 1st Battalion, 20th Infantry of the 11th Brigade. As company commander Captain Medina had briefed the men of his company, assigned them specific missions dispatched them on a combat assault described as a search-and-destroy mission, into the village of My Lai (4) at about 0730 hours on 6 March 1968. The prosecution alleges that the accused was on the ground in and about the village of My Lai (4) from shortly after 0730 hours, 16 March 1968, until after Charlie Company moved from the village of My Lai (4) into a night laager position in the afternoon of 16 March 1968, as well as thereafter. The prosecution also alleges that Captain Medina was in radio contact throughout the operation with his platoons. It is contended that the accused was aware almost from the beginning of the operation that the units of his company were receiving no hostile fire and in fact early in the morning ordered his men to conserve ammunition. The prosecution also contends that some time during the morning hours of 16 March 1968, the accused became aware that his men were improperly killing noncombatants. It is contended that this awareness arose because of the accused's observations, both by sight and hearing, and because of the conversation between Sergeant Minh and the accused. The prosecution contends this time of awareness on the part of the accused was at least at some time between 0930-1030 hours, 16 March 1968, if not earlier. The contention is further made that the accused, as Company Commander, had a continuing duty to control the activities of his subordinates where such activities were being carried out as part of an assigned military mission, and this became particularly true when he became aware that the military duties were being carried out by his men in an unlawful manner. The prosecution contends that Captain Medina, after becoming aware of the killing of noncombatants by his troops, declined to exercise his command responsibility by not taking necessary and reasonable steps to cause his troops to cease the killing

of noncombatants. It is further contended by the prosecution that after the accused became aware of these acts of his subordinates and before he issued an order to cease fire, that a number of unidentified Vietnamese civilians were killed by his troops. The contention is made that Captain Medina did not issue a cease fire order until late in the morning and that when a cease fire order was in fact given, that the troops did cease their fire. It is the prosecution's contention that the accused was capable of controlling his troops throughout the operations, but that once learning he had lost control of his unit, he declined to regain control for a substantial period of time during which the deaths of unidentified Vietnamese civilians occurred. It is finally the prosecution's contention that as a commander the accused, after actual awareness, had a duty to interfere (and) he may be held personally responsible because his unlawful inaction was the proximate cause of unlawful homicides by his men.

B. For the Defense:

Contrary to the theory of the prosecution, the defense alleges that Captain Medina never became aware of the misconduct of his men until too late and immediately upon suspecting that his orders were being misunderstood and improper acts occurring, he ordered his men to cease fire. The accused contends that even though he was on the ground he stayed with his command post west of the village for tactical reasons and never saw any evidence of suspicious or unnecessary deaths until immediately prior to the cease fire order. He contends that he was aware of an artillery prep and double coverage of helicopter gunships, and that it was likely that some noncombatants might be killed by such protective fires. He believed that noncombatants, and particularly the women and children, would not be in the village on that particular morning. He contends that though he saw a few bodies near the vicinity of the village of My Lai (4), he believed these to be the results of the artillery and gunship fire. The accused contends that though he became aware that his troops were out of control, by the time of this awareness, the deaths had all occurred and it was too late to prevent what had occurred; but as soon as he became aware he did issue a cease fire order. He asserts that though there was some degree of volume of fire throughout the morning, he was aware that his men were under orders to kill the livestock in My Lai (4) and in the initial stages of the operation his men were advancing toward and through what he believed to be an area heavily infested with a well-armed enemy and his men were laying down a suppressive fire.